

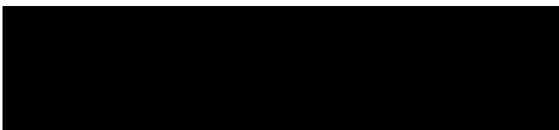
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: **MAY 03 2012**

OFFICE: NEBRASKA SERVICE CENTER



IN RE:

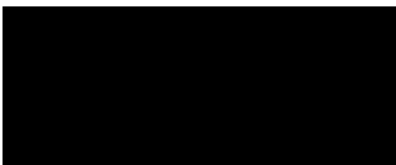
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner researches quantum computing. At the time he filed the petition, the petitioner was a research scientist at Iowa State University, Ames. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation (NYSDOT)*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 14, 2009. In an accompanying statement, counsel stated:

quantum computing is a radical development in the functionality and usefulness of computers, but has not been implemented mainly because interference or "noise" prevents it from working. [The petitioner's] work is in finding ways to overcome this interference. If this research is successful, it could significantly contribute to the

quantum computer moving from mostly theory to reality, and would transform the way we use computers in research, government functions and eventually our every day lives.

The petitioner submitted background documentation about quantum computing. These materials establish the intrinsic merit and national scope of the petitioner's field of inquiry, and the director did not dispute those elements of the petitioner's claim. There is, however, no blanket waiver for quantum computing researchers, and therefore the petitioner must show the extent of his individual impact and influence in the field.

Several witness letters accompanied the initial filing. Iowa State University Professor Ahmed E. Kamal discussed the overall importance of the petitioner's area of research, and noted that the petitioner's work has resulted in two patent applications and several published and presented papers. Prof. Kamal, however, provided few details about the petitioner's work and did not explain why he believed it to be especially significant.

Dr. Amr Youssef, associate professor at Concordia University, Montreal, Canada, stated:

[The petitioner] was able to derive many families of quantum block, convolutional, and subsystem codes constructed from classical coding theory over finite fields. Based on [the petitioner's] recent work along with his advisor, several classes and bounds of subsystem codes parameters are also derived. . . .

But even the work he has done to date on information and cryptography have a national benefit. . . . The ability to protect [government databases] and to encrypt information that is stored on-line is more important now than ever.

[The petitioner] is unusual in that besides his expertise in quantum computation, he has been working on many diverse research projects including information security and cryptography; coding theory and network coding.

An unsigned letter attributed to [REDACTED] at the University of Maryland, Baltimore County, indicates that the petitioner "is known by his research work in the areas of channel coding theory, quantum error correcting codes, network protection against failures and attacks, and network coding for data storage and wireless networks."

[REDACTED] stated that the petitioner "has made important contributions in network coding and wireless networks," but described them only in the most general terms, stating for instance that the petitioner "showed how to construct network coding schemes that protect against node and link failures in networks."

Other letters contain more details about the petitioner's work. An unsigned letter attributed to [REDACTED] Rutgers University, Piscataway, New Jersey, reads in part:

I am aware of [the petitioner's] work because we met at Winlab, Rutgers University in Summer 2007 and [I] have followed his research since. . . .

[The petitioner's] research goals in networking are to develop network protection strategies against link failures and attacks, and to provide practical aspects and limits on those strategies. Also, his research goals in the field of quantum error control codes include the construction of quantum codes that protect quantum information and the utilization of these codes in quantum cryptography. In addition his research approaches in network coding are to derive strong theoretical results that can be verified using simulations or implementations, and to utilize applications of network coding for data storage and network security. . . .

Quantum information is sensitive to noise and needs error correction and recovery strategies. The idea is to construct quantum codes to protect quantum information over symmetric and asymmetric quantum communication channels. . . . [The petitioner] has developed constructions of several families of quantum error control codes. . . .

Protecting against link failures and attacks in communication networks is essential in increasing robustness, accessibility, and reliability of data transmission. [The petitioner] investigated several network protection strategies based on network coding and reduced capacity.

stated:

Murray Hill, New Jersey,

I got to know [the petitioner] during a ten week internship he did at Bell Labs in the Summer of 2007 with me as a mentor, and [I] have an ongoing collaboration with him in the area of distributed storage. . . .

[The petitioner's] research has greatly added to the emerging area of coding based distributed storage, in particular in wireless sensor networks. . . .

[The petitioner] derived two practical networked data storage algorithms for wireless sensor networks. Also . . . he derived theoretical bounds on network coding capacity for wireless networks. . . .

[The petitioner's] more recent work on network reliability and security using network coding is needed to provide advanced solutions for communication networks. . . .

In his current research, he developed two network protection strategies against single and multiple link failures. . . .

His work has already been internationally noticed. All of [the petitioner's] publications . . . have started to be cited by other colleagues working in the same research areas.

An unsigned letter attributed to [REDACTED] Lehigh University, Bethlehem, Pennsylvania, reads in part:

[The petitioner's] contributions in the areas of quantum computing, security and coding theory include the development of:

- 1) network protection codes that provide protection against link/node failures and attacks in optical and mesh networks;
- 2) many families of quantum block, convolutional and subsystem codes constructed from classical coding theory over finite fields;
- 3) two Fountain codes based networked data storage algorithms for wireless sensor networks;
- 4) upper and lower bounds on network coding capacity for wireless random networks;
- 5) security framework for SNMPv3 protocol and analysis of network and wireless security protocols; and
- 6) many classes of capacity-achieving LDPC codes derived from Finite geometry and nonprimitive BCH codes over finite fields.

. . . This research is ground-breaking and important to . . . both information security and encryption technology, as well as to the development of quantum computers. His publication record and patent application show that his work is being recognized nationally and internationally.

Innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *NYSDOT*, 22 I&N Dec. 217 n.7. The filing of a patent application does not “show that [the petitioner's] work is being recognized nationally”; it shows only that the petitioner and his collaborators have sought patent protection for their work. The record contains no evidence that the U.S. Patent and Trademark Office (USPTO) approved a patent application for any of the petitioner's work. Similarly, the publication of the petitioner's work amounts to dissemination rather than recognition; publication does not establish how others in the field have reacted to the published work.

On October 20, 2009, the director issued a request for evidence, instructing the petitioner to “establish . . . a past record of specific prior achievement which justifies projections of future benefit to the national interest.” The director instructed the petitioner to submit documentary evidence to show, among other things, citation of the petitioner's published work and the status of his patent applications.

In response, the petitioner documented his one-year appointment as a visiting research collaborator at Princeton University, New Jersey, and a job offer for an assistant professorship at Essex County College, Newark, New Jersey. These materials establish the petitioner's ongoing ability to secure employment in his field, but do not distinguish him from other qualified workers in the same field.

Counsel stated that the petitioner "is awaiting the results of a grant proposal submitted to the National Science Foundation." That proposal dates from the petitioner's time at Iowa State University. There is no evidence that the Foundation approved the proposal, or that the petitioner would receive grant funding now that he has left Iowa State University. Even then, the petitioner has not shown that grant funding is an unusual achievement, as opposed to a routine means by which research groups meet their expenses.

With respect to the petitioner's patent applications, counsel noted that "one of [them] has already been published." Counsel failed to explain the significance of this information. Elsewhere, counsel referred to the petitioner "obtaining a patent," but the petitioner submitted no evidence that the USPTO has approved any patent application for the petitioner's work. The record contains a "Notice of Publication of Application," but publication is not the same as approval. The notice shows a patent application number, but not a patent number.

Counsel stated that the petitioner "has proven . . . that he is one of . . . those few researchers who understands not only quantum computing but several allied fields and is *more likely than others* to make a significant contribution to this work of major significance." The petitioner, however, had proven no such thing. Counsel simply listed the evidence (sometimes describing it erroneously, for instance referring to a pending patent application as a patent) and declared it to show the petitioner's eligibility for the waiver. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

To show that others have cited his published work, the petitioner submitted printouts from the [REDACTED]. The printouts include a disclaimer that "[REDACTED] is currently only an experimental demonstration. Users are cautioned not to use it for academic evaluation yet. Citation coverage and analysis is incomplete and hit coverage and analysis is both incomplete and noisy" (emphasis in original). The printouts show a total of seven citations of the petitioner's work, with two articles cited thrice each and a third article cited once. Effectively acknowledging the low number of citations, counsel stated "it is not the quantity of citations, but the quality that should be assessed." Counsel did not explain how to determine the quality of the citations. Counsel contended that the previous witness letters show the quality of the petitioner's work, but those letters did not discuss the citations and so counsel's observation is a *non sequitur*.

The [REDACTED] do not specify how many of the citations are independent, showing wider influence, rather than self-citations by the petitioner and/or his collaborators. The petitioner submitted copies of three articles that cited his work. All of the first authors of the articles were at

[REDACTED]. Nothing in the citations self-evidently suggests a particularly high “quality” of citation. One citation reads: “Algebraic codes have been investigated in the quantum setting, e.g. [2, 3, 20, 45],” where reference [2] is the petitioner’s article. Another reads “See also [15], [16] for related concentration results using similar martingale techniques,” where [15] and [16] both refer to works by the petitioner.

The director denied the petition on February 4, 2010, stating that the petitioner had not shown that his “work has yet had a measurable influence in the larger field.” The director noted that the petitioner’s witness letters largely emphasized possible future developments that may eventually arise from the petitioner’s work, rather than existing, demonstrable accomplishments.

On appeal, counsel accuses the director of “a misreading or misunderstanding of much of [the] evidence submitted,” and states that the director “ignored substantial and probative evidence of [the petitioner’s] current contributions to and influence on the field, including ignoring the issuance of a patent based on an application filed well before submission of the case.” Once again, the petitioner did not show that the USPTO ever issued a patent on the petitioner’s work. The petitioner showed only that the USPTO published the patent application, which is not the same thing as a patent.

Counsel asserts that the director “failed to give sufficient weight to testimony of those outside his mentors and collaborators.” The AAO reiterates that many of the witness letters were unsigned, and others were quite vague, offering only the most general outline of the kind of work the petitioner pursues and the benefits that might one day arise from further discoveries in the field. Where the letters did contain specific information, the witnesses simply described the petitioner’s work, without explaining how that work advanced or influenced the field.

Counsel notes that the petitioner “has presented invited talks to some of the leading technology firms and institutions of higher education. . . . It is self-evident that such high caliber research facilities would not invite someone to speak who has no influence on the field.” The AAO disagrees that this conclusion “is self-evident,” and the petitioner cannot, simply by using that term, relieve himself of the burden of proof. For similar reasons, the AAO can grant scant weight to counsel’s contention that “only very talented researchers could be expected to make any progress in this field at all.”

Counsel states that the director “relied on the number of publications and citations without regard to their context and quality,” and failed to consider that the petitioner’s “publication and citation record is above normal.” Counsel cites no evidence to support these claims except for witness letters, already discussed, even though the citation rate for research papers in the petitioner’s field is an empirically verifiable fact rather than a matter of expert opinion.

Counsel asserts that the petitioner’s “work has been referred to as ‘ground breaking’ and ‘extraordinary,’” but in the record these terms appear only in letters that the petitioner solicited specifically to support the petition. There is no evidence that users of the petitioner’s technology have spontaneously used such superlative terms in contexts not directly tied to the petitioner’s efforts to secure benefits.



The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Here, many of the witnesses have made claims that purport to be matters of fact rather than expert opinion, regarding objectively verifiable matters that the record fails to corroborate. Some letters contain demonstrable errors of fact, such as the claim that the petitioner already holds two patents. The AAO agrees with the director's finding that the objective evidence of record simply fails to offer any credible support for the claims in the witnesses' letters.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.